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Details of Filing

Document Lodged:	Outline of Submissions
File Number:	NSD616/2021
File Title:	WESTPAC BANKING CORPORATION ABN 33 007 457 141 & ANOR v FORUM FINANCE PTY LIMITED (IN LIQUIDATION) ACN 153 301 172 & ORS
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA



Sia Lagos

Dated: 29/06/2022 8:40:32 PM AEST

Registrar

Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

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No. NSD of 616/2021

Federal Court of Australia
District Registry: New South Wales
Division: General

Westpac Banking Corporation

ABN 33 007 457 141

Applicant

AND

Forum Finance Pty Ltd

ACN 153 301 172 (In Liquidation)

And Others

Respondents

**Outline of Submissions of the Third Respondent for variation of the freezing order
and release of funds for legal expenses**

(Vincenzo Frank Tesoriero)

I Introduction

1. The Third Respondent (**Mr Tesoriero**) seeks:
 - (a) a variation of the freezing order made against him in order to provide for legal expenses incurred to date and expected between now and the end of the trial; and
 - (b) access to funds paid into Court and funds held in a controlled monies account (**Funds**) for the payment of legal expenses.
2. Mr Tesoriero relies on his affidavits sworn on 21 July 2021, 3 September 2021, 19 October 2021, 8 November 2021 and 17 June 2022. He also relies on affidavits sworn by his solicitor Mr Sazz Nasimi on 9 November 2021 (at paragraphs 13 to 21), 8 February 2022 and 28 June 2022.

II Background – legal expenses to conclusion of trial

3. Paragraph 10(b) of the freezing order (as varied on 12 November 2021) provides that Mr Tesoriero is not prohibited from paying up to \$450,000 until 10 March 2022 on reasonable legal expenses. That order was made with the Applicants' consent.¹ In communications between solicitors, SMBC has said it will consent to the release

¹ Transcript of hearing on 12 November 2021, T24.45-25.2.

of funds from the proceeds of the Margaret Street sale in the amount of \$270,000, for the payment of Mr Tesoriero's reasonable legal expenses.²

4. Further funds are required for Mr Tesoriero to defend the proceeding through to the conclusion of the trial. The fees incurred to date and the fees estimated through to the end of trial are reasonable and proportionate given the size and complexity of the proceeding and the resources available to the Applicants. Compared to the funds likely to be expended by the Applicants, the liquidators and SMBC, the funds sought to be released to Mr Tesoriero for his reasonable legal expenses are relatively modest.
5. Mr Tesoriero is unable to fund his legal expenses without release of money from the Funds. Further, despite an entitlement under the freezing order to ordinary living expenses of \$5,000 per week Mr Tesoriero is unable to access any funds for this purpose, which has been resisted by Westpac and the receivers.
6. In order to ensure a fair trial for Mr Tesoriero, a release of a suitable amount of funds for his legal fees is necessary to ensure equality of arms between the parties.

III Legal principles

Freezing orders and legal expenses

7. A freezing order has the sole purpose of preventing the frustration or inhibition of the Court's process by seeking to meet a danger that a judgment or prospective judgment of the Court will be wholly or partly unsatisfied as a result of the respondent removing, disposing of, dealing with or diminishing the value of assets located in or outside Australia.³ It is no purpose of a freezing order to create rights of security over the subject assets in the applicant's favour.⁴
8. The exception ordinarily made for living, business and legal expenses reflects the purposes of a freezing order.⁵ In a recent survey of Australian authorities, Derham AsJ said in *Vasilaras & Co Pty Ltd v Laprese*:⁶

² Email dated 22 June 2022. SMBC asserts a proprietary claim in respect of 23 Margaret Street Pty Ltd.

³ *Federal Court Rules 2011* (Cth), r 7.32; *Cardile v LED Builders Pty Ltd* [1999] HCA 18; (1999) 198 CLR 380, [41]-[42] (Gaudron, McHugh, Gummow and Callinan JJ).

⁴ *Cardile v LED Builders Pty Ltd* [1999] HCA 18; (1999) 198 CLR 380, [51] (Gaudron, McHugh, Gummow and Callinan JJ).

⁵ See the eight exceptions contained in the form of order considered appropriate by all members of the High Court in *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380, [75], set out by Barrett J in *Goumas v McIntosh* [2002] NSWSC 713, [28].

⁶ [2019] VSC 56; (2019) 58 VR 155, [71]-[72].

Because it is not security, and because the object is to prevent an abuse of the process of the Court by the defendant disposing of his [or her] assets to defeat any judgment, the freezing order cannot extend to prevent a respondent from having access to its own assets to the extent necessary to meet legitimate expenses such as ordinary living and business and legal expenses.⁷

Derham AsJ adopted the statement of Barrett J in *Goumas v McIntosh*⁸ that (emphasis added):

*The aim is not to stop people spending their money. It is to stop them spending it in ways which are not legitimate, having regard to the interest of the claimant in ensuring that there is no untoward removal of assets from the ownership of the person against whom a judgment may in due course be entered.*⁹

9. The Court may vary a freezing order in its discretion, dictated by what justice demands in the particular circumstances of the case.¹⁰ Relevant matters include whether the grant of the requested variation would create a substantial risk that as of the date of judgment the respondent holds insufficient assets to satisfy the Court's orders upon judgment, rendering the judgment nugatory and frustrating the Court's processes.¹¹
10. A respondent seeking the relaxation of a freezing order to permit the payment of legal costs must satisfy the Court that the respondent has no assets available to pay those legal costs other than assets the subject of the order.¹²
11. To be "available" to fund the respondent's legal costs, an asset to which the respondent has title or over which the respondent has control must be regarded as representing available value. An asset is unavailable for this purpose if it requires to be sold or utilised in a particular way in order to represent available value (i.e. liquid funds).¹³

⁷ See *Clout (Trustee) v Anscor Pty Ltd* [2001] FCA 174, [19].

⁸ [2002] NSWSC 713.

⁹ *Goumas v McIntosh* [2002] NSWSC 713, [23].

¹⁰ *MG Corrosion Consultants Pty Ltd v Gilmour* [2012] FCA 568, [14] (Barker J); *Vasilaras & Co Pty Ltd v Laprese* (2019) 58 VR 155, [73] (Derham AsJ).

¹¹ *Vasilaras & Co Pty Ltd v Laprese* (2019) 58 VR 155, [73(g)].

¹² *Vasilaras & Co Pty Ltd v Laprese* (2019) 58 VR 155, [73(c)].

¹³ *Goumas v McIntosh* [2002] NSWSC 713, [25]-[26] (Barrett J).

Equality of arms

12. The principle of equality of arms is a central feature of a fair trial:¹⁴

[A]ccording to the principle of equality of arms, as one of the features of the wider concept of a fair trial, each party must be afforded a reasonable opportunity to present his case in conditions that do not place him at a disadvantage *vis-à-vis* his opponent.

13. That principle is reflected in the principles and practice that attend freezing orders. To deny access to funds needed ‘to fund the conduct of the very litigation the integrity of which the [freezing] order is designed to protect goes beyond the proper protective province of the jurisdiction’¹⁵ to make freezing orders.

Use of funds subject to a proprietary claim for legal expenses

14. In exercising its discretion to vary a freezing order, the Court may have regard to a proprietary interest asserted over the frozen assets and the extent to which the claimants have established a prima facie entitlement to the frozen assets.¹⁶ Ultimately the question is whether a respondent should be allowed to use what *may* be the applicant’s money to conduct the respondent’s defence.¹⁷ The enquiry calls for a ‘careful and anxious judgment’ to assess the risk of injustice to the applicant if the variation is granted and the respondent uses released funds to finance an unsuccessful defence against the injustice to the respondent of denying the opportunity to advance an arguable defence.¹⁸
15. A variation which removes trust assets from a freezing order to allow the respondent to use those to pay legal expenses permits the respondent to do what would otherwise be a contempt of court. The variation does not as such convert trust assets into non-trust assets. However, a *claim* that assets are held on trust is less than a *fact* that assets are held on trust.¹⁹ That difference is significant

¹⁴ *Foucher v France* (1998) 25 EHRR 234, [34], as cited in *Ragg v Magistrates Court of Victoria* (2008) 18 VR 300, 310-312 [45]–[46] (Bell J).

¹⁵ *Goumas v McIntosh* [2002] NSWSC 713, [27] (Barrett J); *Vasilaras & Co Pty Ltd v Laprese* (2019) 58 VR 155, [72].

¹⁶ *Re Courtenay House Capital Trading Group Pty Limited (in liquidation)* [2018] NSWSC 1918, [51] (Black J); *Crosby Textor Research Strategies Results Pty Limited v Syed* [2020] NSWSC 1792, [34] (submissions adopted at [36]), [41] (Rees J); *National Australia Bank Limited v Human Group Pty Ltd (No 2)* [2020] NSWSC 1900, [106]–[112] (Henry J).

¹⁷ *Crosby Textor Research Strategies Results Pty Limited v Syed* [2020] NSWSC 1792, [41] (Rees J).

¹⁸ *Birketu Pty Ltd v Westpac Banking Corporation (No. 2)* [2018] NSWSC 494, [60]–[61] (Garling J); *Crosby Textor Research Strategies Results Pty Limited v Syed* [2020] NSWSC 1792, [42] (Rees J); *National Australia Bank Limited v Human Group Pty Ltd (No 2)* [2020] NSWSC 1900, [110]–[112] (Henry J).

¹⁹ See *Break Fast Investments Pty Ltd v Rigby Cooke Lawyers* [2022] VSCA 118, [147] (Kyrou, McLeish and Walker JJA). The issue to which this paragraph of the Court of Appeal’s reasons were addressed was whether

where the claimed trust is a constructive trust the existence of which depends on findings of fact that are contested; which go to the heart of the dispute; and which cannot be known by the parties (or anyone else) until evidentiary uncertainties are resolved by judicial findings of fact.²⁰

16. Hence the fact alone that ‘frozen’ assets are claimed to be subject to one or more constructive trusts is only one relevant matter in the enquiry to be undertaken by the Court where the applicant seeks variation of a freezing order. As the ultimate question of whether a respondent should be allowed to use what *may* be the applicant’s money to conduct the respondent’s defence,²¹ the following considerations of equitable principle should properly apply:

In a case where the defendant’s only source of funds for the payment of defence costs is the property the subject of the alleged trust, the defendant is likely to have difficulty in persuading the solicitor to continue to act for it or to find any other solicitor willing to represent it, if the proceeding could not be funded from that property. This consequence would arise notwithstanding that the Court has not yet determined whether a trust exists and, if it does, whether it has been breached, and notwithstanding that the defendant has a proper basis for arguing that there is no trust or breach of trust. The result may well be that the defendant may not be able to obtain legal representation to properly defend the litigation and the plaintiff may succeed in the litigation in circumstances where, with proper legal representation, the defendant may have successfully defended the plaintiff’s claim. It is difficult to see how such an outcome could be justified as a matter of public policy, or why equity would prevent a solicitor from undertaking his or her professional obligations in such circumstances.²²

IV The Court should make orders permitting legal expenses and releasing monies from the CMA and the monies held in Court for the Third Respondent’s legal expenses in this proceeding

The Third Respondent’s entire assets have been frozen since July 2021

17. On 2 July 2021, Lee J made a freezing order against Mr Tesoriero without notice. The order applied to all of Mr Tesoriero’s assets up to the unencumbered value of AUD254,219,440.23. The order provided for reasonable legal expenses up to \$25,000.

solicitors were personally liable for knowing receipt of trust moneys (under the first limb of *Barnes v Addy*) where legal fees charged by the solicitors for work done were paid from assets claimed (but which had not been found as of the time of payment) to be trust assets.

²⁰ *Break Fast Investments Pty Ltd v Rigby Cooke Lawyers* [2022] VSCA 118, [145]-[149].

²¹ *Crosby Textor Research Strategies Results Pty Limited v Syed* [2020] NSWSC 1792, [41] (Rees J).

²² *Break Fast Investments Pty Ltd v Rigby Cooke Lawyers* [2022] VSCA 118, [150] (Kyrou, McLeish and Walker JJA).

18. On 9 July 2021, the order was varied and extended until further order with Mr Tesoriero's consent (without admission). At the hearing the Applicants' counsel said, with reference to Mr Tesoriero's counsel:²³

Your Honour will see that the order has now been extended until further order. I accept and I've agreed with Mr McNelly that should his client make an application to vary or to set aside this order then I will bear the onus. That is, I will bear the onus of showing that it should be extended and he doesn't need to show a change of circumstance.

Among other things, the order as varied on 9 July 2021 provided for reasonable legal expenses of \$30,000 per month up to \$350,000.

19. On 12 November 2021, the order was again varied. Among other things, the order as varied on 12 November 2021 provided for reasonable legal expenses up to \$450,000 until 10 March 2022.

The claim against the Third Respondent

Background to the claim

20. Central to the Applicants' case is 'the Scheme',²⁴ said to have been devised by the Second Respondent (**Mr Papas**) 'either together with Mr Tesoriero or alone'.²⁵ The Scheme is alleged to have involved:²⁶

- (a) the creation of 'Fraudulent Documents' by Mr Papas;
- (b) the submission of the Fraudulent Documents by Mr Papas to BHD Leasing/Eqwe to be passed on to the Applicants as part of the 'Eqwe / Forum Programme';
- (c) the payment of funds by the Applicants to Forum Finance/IUGIS NZ;
- (d) the dispersal of the funds to Mr Papas, Mr Tesoriero or other entities or persons related to one or both of them.

21. The Scheme is alleged to have been carried out by 137 fraudulent transactions, which are pleaded in Section D of the 2FASOC (**the 137 Transactions**). Mr Tesoriero is not alleged to have been involved in any of the 137 Transactions. No allegation has been made against Mr Tesoriero that he played any direct role

²³ Transcript of hearing on 9 July 2021, T37.25-32.

²⁴ As defined in Section C of the Second Further Statement of Claim filed on 11 September 2021 (**2FASOC**): [55]-[56].

²⁵ 2FASOC, [55].

²⁶ 2FASOC, [56]. In this paragraph and in further paragraphs below, entity names are used as defined in the 2FASOC.

in procuring the 137 Transactions. Nor has any specific allegation been made against him that he knew the 137 Transactions were indeed fraudulent and/or were fraudulently procured by Mr Papas.

22. The Applicants allege that the Scheme was discovered in June 2021 and that a demand was issued to Forum Finance Pty Ltd on 1 July 2021.²⁷ After deducting funds recovered from a clearing account, the amount said to be outstanding under the demand is \$253,766,555.76.²⁸ That amount is the loss claimed by Westpac. WNZL claims that it suffered loss amounting to NZD44,097,969.
23. The Applicants' claim against Mr Tesoriero (**the claim**) is set out in Section H of the Second Further Amended Statement of Claim and in responses to requests for further and better particulars.²⁹
24. The claim is made up of five causes of action. The claim is poorly particularised (especially when it comes to Mr Tesoriero's 'knowledge' of the Scheme and his participation in it) and amounts to no more than bare allegations made against Mr Tesoriero. Such concerns have been previously voiced before the Court by Mr Tesoriero's counsel.³⁰ It is a weak case. For the reasons that follow, the Applicants have not established a *prima facie* entitlement to the frozen assets.

Funds held on trust

25. In Section H(1), the Applicants allege that Mr Tesoriero holds on trust for the Applicants all funds, or the traceable proceeds of those funds, that he has received from the payments made pursuant to the 137 Transactions.
26. The trust is said to arise at law and is alleged to apply to funds that were 'fraudulently obtained by Mr Tesoriero through his involvement in the Scheme',³¹ 'from the fact that the money was stolen from Westpac and WNZL'.³²

²⁷ 2FASOC, [1831].

²⁸ 2FASOC, [1833].

²⁹ Request for particulars dated 31 August 2021 and responses dated 10 September 2021 and 22 September 2021 (**22 September Particulars**), and request for particulars dated 3 December 2021 and response dated 31 January 2022 (**31 January Particulars**).

³⁰ Hearing on 12 November 2021, T11.18-24; hearing on 9 February 2022, T17.27.

³¹ 2FASOC, [1895], particular (iv).

³² 31 January Particulars, [33].

Tort of unlawful means conspiracy

27. In Section H(2), the Applicants allege that Mr Tesoriero reached an agreement with Mr Papas to devise and implement the Scheme (**the Scheme Agreement**),³³ which was carried into effect by the 137 Transactions.³⁴
28. The Applicants allege that Mr Tesoriero took various acts in furtherance of the Scheme Agreement.³⁵
- (a) signing the First and Second Forum Agreements (being the agreements between Forum Finance and BHD Leasing/Eqwe);
 - (b) being a director of Forum Finance and a shareholder of FGFS, 'the predominant corporate purpose of which was to carry into effect the Scheme';
 - (c) procuring or permitting Forum Finance to pay amounts it received from Westpac away to third parties;
 - (d) receiving (directly or via related entities) money derived from the 137 Transactions.

Knowing receipt (*Barnes v Addy*)

29. In Section H(3) of the 2FASOC, the Applicants bring a *Barnes v Addy* knowing receipt claim against Mr Tesoriero in relation to amounts he received which were derived from the 137 Transactions.
30. The claim is brought on the basis that Mr Tesoriero knew or ought to have known that the funds he received were dishonestly obtained, because he was aware of the following facts:³⁶
- (a) the funds were obtained pursuant to the Scheme and the 137 Transactions, and Forum Finance/IUGIS NZ had no legitimate business which would entitle them to use those funds themselves;
 - (b) the funds were to finance the acquisition of assets for the underlying customers and were not amounts which Forum Finance/IUGIS NZ could use or pay away to related parties;

³³ 2FASOC, [1898].

³⁴ 2FASOC, [1899].

³⁵ 2FASOC, [1900].

³⁶ 2FASOC [1905].

- (c) the ultimate recipients of those funds (being Mr Tesoriero and related entities) had no legitimate basis to receive those payments.

Knowing assistance (Barnes v Addy)

- 31. In Section H(4) of the 2FASOC, the Applicants bring a *Barnes v Addy* knowing assistance claim against Mr Tesoriero.
- 32. The claim is based on the same substantive allegations as the conspiracy claim—that is, Mr Tesoriero:
 - (a) was aware of the Scheme because he had devised it and carried out the acts summarised in paragraph 28 above;
 - (b) knowingly assisted breaches of obligations as trustee owed to Westpac/WNZL by Forum Finance/IUGIS NZ by carrying out the acts summarised in paragraph 28 above.

Misleading or deceptive or false or misleading conduct

- 33. In Section H(5) of the 2FASOC, the Applicants allege that Mr Tesoriero was involved in misleading or deceptive conduct carried out by Forum Finance and Mr Papas, because:
 - (a) he entered into the Scheme Agreement;
 - (b) he carried out the acts summarised in paragraph 28 above;
 - (c) he had the knowledge summarised in paragraph 30 above.

Mr Tesoriero's knowledge

- 34. The central feature of all causes of action pleaded against Mr Tesoriero is the allegation that he knew about the Scheme—that is, he knew of the plan to use the Fraudulent Documents to obtain money from Westpac/WNZL. The Applicants bear the onus of proof of 'knowledge' at trial (to the appropriate *Briginshaw* standard). The issue of Mr Tesoriero's knowledge of the Scheme (which he denies) is hotly in dispute between the Applicants and Mr Tesoriero and will require the Court to make a factual determination on this issue after it has heard all of the evidence. For the reasons explained in the following paragraphs, the Applicants have failed to adequately particularise this critical feature of their case sufficient to establish a *prima facie* entitlement to the frozen assets.
- 35. The Applicants do not allege that Mr Tesoriero had any involvement in the 137 Transactions, or in the actual creation of the Fraudulent Documents. They seek to establish Mr Tesoriero's knowledge of the Scheme based on inference.

36. The Applicants seek to establish Mr Tesoriero's knowledge by inference from the following categories of fact set out in the particulars response letters:³⁷
- (a) Mr Tesoriero's involvement as a director or shareholder of various Forum entities since around 2014;
 - (b) Mr Tesoriero's receipt of bank statements and other financial information;
 - (c) Mr Tesoriero's involvement in the settlement of a dispute with Maia Financial Pty Ltd (**Maia**); and
 - (d) the fact that Mr Tesoriero signed the First and Second Master Agreements.
37. The Applicants also seek to rely on Mr Tesoriero's receipt of funds from the Forum Group, either directly or via related entities, to support the inference that he devised the Scheme. However, this presupposes the conclusion—if the Scheme did not exist and Forum was entitled to receive the funds paid by Westpac under the Forum / Eqwe Programme, then the receipt of funds does no more than establish how Forum dealt with its legitimate income. It follows that the ultimate destination of the funds is irrelevant for the purposes of inferring Mr Tesoriero's knowledge of the Scheme.
38. The majority of the facts relied on by the Applicants go no further than establishing that Mr Tesoriero was aware of the Eqwe / Forum Programme, and potentially that Mr Tesoriero was aware that the Forum Group was receiving money from Westpac under the Programme. To the extent that the Applicants seek to infer facts beyond this, they are either based on bare assertions, or descend into impermissible speculation.
39. The Applicants have pleaded facts that are consistent with Mr Tesoriero's honest belief in the legitimacy of the Forum / Eqwe Programme:
- (a) Mr Tesoriero had been involved in the Forum business since at least February 2013;³⁸
 - (b) given Mr Tesoriero's role as director of TFGC, he was aware of the activities it engaged in from time to time, including that it received money from the Applicants;³⁹

³⁷ 22 September Particulars, [12]; 31 January Particulars [7].

³⁸ 22 September Particulars, [12(a)]; 31 January Particulars, [7(a)].

³⁹ 22 September Particulars, [12(b)].

- (c) Mr Tesoriero had access to financial information about the Forum Group and FGFS and was aware that they received money from the Applicants;⁴⁰
 - (d) Mr Tesoriero was a director of Forum Finance and FGFS and was aware of the activities they engaged in, where they obtained and dispersed money, and the transactions entered into with the Applicants under the Forum / Eqwe Programme;⁴¹
 - (e) Mr Tesoriero signed the First and Second Master Agreements and knew how they were intended to operate.⁴²
40. To the extent that the Applicants' particulars seek to draw inferences of knowledge of the Scheme, they descend into impermissible and unsupported speculation. In particular:
- (a) Based simply on the fact that Mr Tesoriero was a director of Forum Finance and FGFS, the Applicants seek to infer that Mr Tesoriero was aware of Forum Finance and FGFS's 'involvement in Transactions 1 to 100 and their underlying fraudulent nature', and 'the circumstances in which Forum Finance engaged in those transactions as pleaded in Part D'.⁴³ No facts are alleged, or particulars provided, to support an allegation that Mr Tesoriero's role as a director required him to be aware of every transaction entered into by Forum Finance and FGFS. The allegation that a director is automatically aware of the 'underlying fraudulent nature' of transactions entered into by a corporation is a mere assertion.
 - (b) On a similar basis, based on receipt of Excel spreadsheets containing financial information, it appears to be alleged that Mr Tesoriero was aware that funds received from the Applicants were not being used to fund equipment leases.⁴⁴ It is unclear how the spreadsheets are alleged to demonstrate this.

41. In relation to Mr Tesoriero's involvement in a settlement with Maia:

⁴⁰ 22 September Particulars, [12(c),(s)], 31 January Particulars, [7(a)].

⁴¹ 22 September Particulars, [12(d)-(e),(p)], 31 January Particulars, [7(e)].

⁴² 22 September Particulars, [12(m),(n)].

⁴³ 22 September Particulars, [12(d)-(e),(p)].

⁴⁴ 31 January Particulars, [7(g)-(h)].

- (a) the particulars contain a bare assertion (which is itself unparticularised) that the Forum Group had previously been involved in a scheme to defraud Maia using false invoices, which was detected by Maia and led to a settlement;⁴⁵
- (b) Mr Tesoriero's involvement in the alleged Maia scheme is said to be inferred from:
 - (i) the fact that he was a director of FGFS;⁴⁶
 - (ii) the fact that he was involved in the negotiation of the settlement with Maia, and signed a Deed of Guarantee and Indemnity as part of the settlement.⁴⁷

42. In relation to the Deed of Guarantee, the particulars state:⁴⁸

It is to be inferred that Mr Tesoriero gave this guarantee because he was aware of the fraud that FG, FE and FGFS had perpetrated and the repercussions for him if it was exposed and needed to give this guarantee in order to minimise those repercussions. This is because, if the fraud on Maia had only been perpetrated by Mr Papas, then Mr Tesoriero would have refused to give this guarantee and would have immediately resigned as a director of Forum Finance. He would not have continued in that role and agreed to be appointed as a director of FGFS. Instead, Mr Tesoriero remained as a director of Forum Finance and agreed to be appointed as a director of FGFS.

43. The reasoning in this paragraph of the particulars is an example of the circular logic of much of the Applicants' particulars. The Applicants seek to infer that Mr Tesoriero was involved in an alleged Maia fraud on the basis that he gave a guarantee, and they seek to infer that he gave the guarantee because he was involved in the alleged fraud. The existence of the fraud is itself a mere assertion—there is nothing on the face of the documents referred to in the particulars which provides evidence that any such fraud existed, or that Mr Tesoriero was aware of it.

Third Respondent's defence to claim

44. Mr Tesoriero denies that he had any knowledge of the Scheme prior to late June 2021 and denies any involvement in the Scheme.⁴⁹ Specifically, Mr Tesoriero:

⁴⁵ 22 September Particulars, [12(f),(h)].

⁴⁶ 22 September Particulars, [12(g)].

⁴⁷ 22 September Particulars, [12(i)-(l)].

⁴⁸ 22 September Particulars, [12(l)].

⁴⁹ Defence of the Third Respondent filed 20 April 2022, [55]-[58], [59 -1830], [1844], [1845], [1865].

- (a) denies that he devised or implemented the Scheme with Mr Papas, or at all;
 - (b) does not know and therefore does not admit that Mr Papas devised and implemented the Scheme or had any dishonest and fraudulent purpose in doing so;
 - (c) denies that he had any knowledge whatsoever of the Scheme prior to late June 2021;
 - (d) does not know and therefore does not admit that the Scheme operated as alleged by the Applicants;
 - (e) denies that he reached any agreement to devise and implement the Scheme;
 - (f) denies that he was a co-conspirator;
 - (g) denies any knowledge that the 137 Transactions were fraudulently concocted by Mr Papas or were not genuine.
45. For the Applicants to succeed against Mr Tesoriero they need to show that he knew Mr Papas forged the 137 Transactions and they were not genuine – that is *central* to their case against Mr Tesoriero.
46. It is highly likely that Mr Tesoriero did not know about Mr Papas’ conduct in circumstances where Mr Papas is likely to have sought to actively conceal his conduct from Forum, its auditors and Westpac and Eqwe. If the Court finds that those persons were not aware of fraudulent conduct being undertaken by Mr Papas, it is highly likely that Mr Tesoriero did not know either.
47. Mr Tesoriero deposed in his November 2021 affidavit to the circumstances in which he invested in the Forum group of companies⁵⁰ and his role in the group.⁵¹ He said that his investment in the group was sourced from borrowed funds against properties he owned.⁵² Mr Tesoriero’s investments were initially made on an expectation of exiting his investment once it had acquired a higher valuation⁵³ but

⁵⁰ Affidavit of Vince Tesoriero dated 8 November 2021 (**November 2021 affidavit**), [11]-[23].

⁵¹ November 2021 affidavit, [24]-[39].

⁵² November 2021 affidavit, [18].

⁵³ November 2021 affidavit, [16], [19].

after a few years Mr Papas changed the strategy and Mr Tesoriero sought and obtained a promise of a return on his investment.⁵⁴ He said:⁵⁵

between 2012 and 2019 I made financial contributions of between \$7 and \$10 million to the business. Since 2017, I have received approximately \$12 million from the business, in the manner referred to in paragraph 21 above, either directly or through entities I control, as a return on and/or of my financial contributions to the business.

48. As a result of this evidence there is real doubt, to be resolved at trial, whether the Applicants have established a *prima facie* entitlement to the frozen assets.
49. Mr Tesoriero also deposed to his recollection that the assets referred to in his affidavits were not all acquired with funds originating from the Forum group of companies, although he was not able to identify which specific assets this applied to or the source of the funds used to purchase those assets.⁵⁶ This remains a matter for trial.

Third Respondent no (unrestrained) liquid funds available to fund legal defence or ordinary living expenses

50. Mr Tesoriero deposes in his June 2022 affidavit that he has no funds available to him to fund his legal expenses.⁵⁷ He explains that funds in bank accounts and rent from residential properties have been entirely absorbed by mortgage payments.⁵⁸ This is supported by a letter from his accountant:⁵⁹

I can state that all funds presently being derived by Mr Tesoriero, via his associated entities are being applied to various bank debts that either he or his associated entities currently have.

No surplus moneys are currently available from which Mr Tesoriero can either fund his personal expenses or his legal defence.

51. Mr Tesoriero also deposes to the legal expenses incurred to date (including to his former solicitors) and those estimated by his solicitors through to the end of the trial.⁶⁰ This amount, totalling \$1,866,000, far exceeds the current allowance of

⁵⁴ November 2021 affidavit, [20]-[21].

⁵⁵ November 2021 affidavit, [22].

⁵⁶ November 2021 affidavit, [6].

⁵⁷ Affidavit of Vince Tesoriero dated 17 June 2022 (**June 2022 affidavit**), [34]-[39].

⁵⁸ June 2022 affidavit, [37]-[39].

⁵⁹ June 2022 affidavit, [36]; VFT-5, 52.

⁶⁰ June 2022 affidavit, [34]; affidavit of Sarwar (Sazz) Nasimi dated 28 June 2022, [6]-[7].

\$450,000 which was only to 10 March 2022 and does not include any amount for fees found to be owing to Mr Tesoriero's previous solicitors.⁶¹

52. Without variation of the freezing order and release of funds for his reasonable legal expenses, Mr Tesoriero will be left without funds to pay his lawyers. He would therefore be left to defend serious and complex claims being made by well-resourced Applicants without the resources to properly defend the claim.

Scale of proceeding and resources available to Westpac

53. The outstanding loss which the First Applicant, Westpac, claims to be entitled to recover from Mr Tesoriero is in the amount of \$253,766,555.76.⁶² As noted above, Westpac relies on multiple causes of action – by way of trust, the tort of unlawful means conspiracy, equitable liability for knowing receipt, equitable liability for knowing assistance, the tort of deceit, and misleading or deceptive conduct or false or misleading conduct. Each cause of action is pleaded in respect of conduct relating to the 137 Transactions.⁶³ Westpac has discovered over 35,000 documents. Mr Tesoriero has requested that Westpac identify which of those documents are critical to its case and which it relies on in its case against him.⁶⁴ Westpac has ignored that request.
54. To prepare his defence, Mr Tesoriero requires his legal representatives to perform a great deal of work before the trial commences on 10 October 2022, and the critical work of conducting his representation at trial. Without available funds to finance this work, Mr Tesoriero is severely disadvantaged relative to Westpac. He will be unable to pay the fees of his legal representatives. In that case, he is likely to have difficulty retaining legal representation, notwithstanding that he has a proper basis for defending the many complex claims brought against him – including the claims that he and entities associated with him hold assets subject to constructive trusts.
55. If Mr Tesoriero were to be so disadvantaged, it is difficult to see how success by Westpac in the numerous complex claims it maintains could be justified as a matter of public policy. It is also difficult to see why the nature of Westpac's claims

⁶¹ As to the fees of Fortis Law, see June 2022 affidavit, [18]-[24].

⁶² 2FASOC, [1892].

⁶³ 2FASOC, [1862]-[1863], [1866]-[1867], [1869]-[1872], [1875]-[1876], [1879]-[1884], [1889]-[1891].

⁶⁴ Email dated 31 May 2022.

should prevent Mr Tesoriero's legal representatives from undertaking their professional obligations to their client.⁶⁵

The controlled monies account and funds in Court for the Third Respondent's use

56. Two controlled monies accounts are in operation.
- (a) One was opened on 16 May 2022 in the joint names of Westpac and Madgwicks as trustee for Mr Tesoriero, to receive the surplus funds from the sale of the property 23 Margaret Street, Rozelle NSW 2039 by the Thirteenth Respondent, which is entity associated with Mr Tesoriero.⁶⁶ \$1,340,866.65 was paid into that account where that amount remains⁶⁷ (**the first controlled monies account**).
- (b) The second such account is controlled by the receivers, and contains \$9,808,169.94 representing the surplus sale proceeds of the property at 6 Bulkara Street, Wagstaffe NSW 2257⁶⁸ (**the second controlled monies account**).
57. In addition, Mr Tesoriero paid \$773,362.88 into the Federal Court of Australia in around October 2021 by his then solicitors pursuant to an order of the Court. Those moneys represent a refunded deposit, minus expenses, that Mr Tesoriero initially paid to a vendor for the purchase of the property at 8-12 Natalia Avenue, Oakleigh South VIC 3167⁶⁹ (**the Federal Court funds**).
58. Following the sale of the Glen Huntly Road property by the mortgagee (NJ Capital), the surplus funds realised were paid into the Supreme Court of Victoria on 3 March 2022.⁷⁰ These surplus monies were paid into the Supreme Court of Victoria by NJ Capital despite there being no proceedings on foot in the Supreme Court of Victoria. Such monies now total \$759,619 (**the Supreme Court of Victoria funds**). Accordingly, the Court should order the transfer of these funds from the Supreme Court of Victoria to the first controlled monies account.
59. Regarding those monies, Westpac's claims include proprietary claims:

⁶⁵ Compare *Break Fast Investments Pty Ltd v Rigby Cooke Lawyers* [2022] VSCA 118, [150] (Kyrrou, McLeish and Walker JJA).

⁶⁶ 2FASOC, [7(e)(i)].

⁶⁷ June 2022 affidavit, [13], [15]; VFT-5, 48.

⁶⁸ June 2022 affidavit, [16]; VFT-5, 50.

⁶⁹ June 2022 affidavit, [11]; affidavit of Vince Tesoriero dated 19 October 2021 (**October 2021 affidavit**), [17]-[27].

⁷⁰ June 2022 affidavit, [12]; VFT-5, 47.

- (a) to the moneys allegedly received by the Thirteenth Respondent pursuant to any one or more of the 137 Transactions in an unknown amount.⁷¹ it is for Westpac to show that the monies in the **first controlled monies account** answer the description of assets that are subject to Westpac's proprietary claim against the Thirteenth Respondent;
- (b) to the moneys allegedly received by the Twelfth Respondent pursuant to any one or more of the 137 Transactions in an unknown amount.⁷² it is for Westpac to show that the monies in the **second controlled monies account** answer the description of assets that are subject to Westpac's proprietary claim against the Twelfth Respondent;
- (c) to the moneys allegedly received by the Forty-first Respondent pursuant to any one or more of the 137 Transactions in an unknown amount.⁷³ Mr Tesoriero is a director of the Forty-first Respondent.⁷⁴ It is for Westpac to show that the **Federal Court funds** answer the description of assets that are subject to Westpac's proprietary claim against the Forty-first Respondent;
- (d) to the moneys allegedly received by the Fourteenth Respondent pursuant to any one or more of the 137 Transactions in an unknown amount.⁷⁵ it is for Westpac to show that the **Supreme Court of Victoria Funds** answer the description of assets that are subject to Westpac's proprietary claim against the Fourteenth Respondent.

60. Unless and until Westpac establishes a *prima facie* case that those monies are trust monies that answer its various claims (which in the case against Mr Tesoriero, depends upon his knowledge of and/or participation in the Scheme – and which at best could be described as a 'weak circumstantial case' against Mr Tesoriero), they are to be considered the monies of Mr Tesoriero and his associated entities. As such, the use of those monies to finance the preparation and conduct of Mr Tesoriero's and his associated entities' defence is to be considered legitimate and proper to meet the numerous, complex and grave allegations made against them by Westpac.

⁷¹ 2FASOC, [2078]-[2081].

⁷² 2FASOC, [2062]-[2063].

⁷³ 2FASOC, [2581]-[2582].

⁷⁴ 2FASOC, [34K].

⁷⁵ 2FASOC, [2096]-[2099].

61. Even if Westpac establish a *prima facie* case that the monies in question are trust moneys apt to answer certain of its claims, the considerations of public policy – the ‘equality of arms’ principle and the points adverted to in paragraphs 16 and 54-55 above – weigh heavily in favour of permitting Mr Tesoriero to have access to these monies for the purpose of financing the costs of his defence of the claim brought against him.
62. Finally, as is the case with Mr Tesoriero’s legal expenses, provision should also be made for his ordinary living expenses to give effect to the Court’s order of \$5,000 per week for this purpose.⁷⁶ He has not drawn down on any of this money since September 2021 and has been relying on loans from friends and family.⁷⁷ The Court should ensure that Mr Tesoriero is able to access such monies unimpeded by SMBC and Westpac.

V 5 Bulkara Street – The Aksara debt

63. There may be further surplus funds available to Mr Tesoriero (to be paid into a CMA) following the sale of 5 Bulkara Street, Wagstaffe NSW 2257, subject to paying out those entities which claim an interest in this property.⁷⁸ These claims include:
- (a) a first registered mortgage in favour of the National Australia Bank (**NAB**);
 - (b) a guarantee provided in respect of a facility for Forum Group Pty Ltd (Receivers and managers appointed) in favour of NAB;
 - (c) an equitable mortgage (caveat registered) in favour of Aksara Holdings Pty Ltd (**Aksara**); and
 - (d) Westpac’s proprietary claim in this proceeding (disputed by Mr Tesoriero).
64. The 5 Bulkara Street property is listed for sale⁷⁹ (a mortgagee sale) and NAB has refused to provide Mr Tesoriero with any documents pertaining to the sale.⁸⁰ The solicitors acting for NAB have advised that they have exchanged contracts for the

⁷⁶ Paragraph 10(a) of the freezing order.

⁷⁷ June 2022 affidavit, [36]; October 2021 affidavit, [28]; affidavit of Sarwar (Sazz) Nasimi dated 28 June 2022, [21].

⁷⁸ June 2022 affidavit, [40]-[41].

⁷⁹ June 2022 affidavit, [40].

⁸⁰ Affidavit of Sarwar (Sazz) Nasimi dated 28 June 2022, [32].

sale of the property, that there will be a surplus remaining after settlement, and that absent agreement between all claimants will pay that surplus into Court.⁸¹

65. It is expected that following the sale of 5 Bulkara Street for a consideration of approximately \$9 million to \$10 million and the discharge of the NAB mortgage in the amount of \$3.68 million, there will be surplus funds of approximately \$5 million to \$6 million.
66. On 3 June 2022, Mr Tesoriero, through his solicitors, wrote to Dentons, the solicitors for the NAB (copying in Westpac's solicitors Minter Ellison and the Liquidator of Forum's solicitors, Allens) requesting that the Aksara debt of approximately \$5.5 million, be paid out of the surplus realised on the sale of 5 Bulkara Street (after paying out the NAB first registered mortgage).⁸² Other than bare assertion, Westpac has not explained in any meaningful detail why it is entitled to priority over Aksara's interest in the property, especially in circumstances where a caveat notifying Aksara's interest was registered over 5 Bulkara Street.⁸³
67. Subsequently, on 8 June 2022, Westpac's solicitors Minter Ellison, wrote to Mr Tesoriero's solicitors objecting to the discharge of the Aksara debt from the surplus funds realised from the sale of 5 Bulkara Street, instead requesting that such funds be paid into Court, subject to the determination of any dispute between Westpac and Aksara.⁸⁴
68. Although Westpac asserts it has priority over Aksara in respect of the surplus 5 Bulkara Street funds (by reason of the proprietary interest it claims in these monies, which it claims ranks ahead in time of Aksara's interest as equitable mortgagee), to date, no claim has been made by Westpac against Aksara in respect of the priority of payment as to these surplus funds.
69. As this discrete issue presently stands, because of Westpac's failure to fully articulate the basis as to why it is entitled to priority in the payment of the 5 Bulkara Street surplus funds, then such monies should not be paid into Court and should be released to Aksara in settlement of its debt. Further, by holding such monies in Court (indefinitely until Westpac decides to make a claim in respect of those monies) also adds to the burden imposed on Mr Tesoriero, by forcing him to

⁸¹ Affidavit of Sarwar (Sazz) Nasimi dated 28 June 2022, [30]; SN-5, 40.

⁸² Affidavit of Sarwar (Sazz) Nasimi dated 28 June 2022, [28]; SN-5, 35-36.

⁸³ June 2022 affidavit, [41(c)].

⁸⁴ Affidavit of Sarwar (Sazz) Nasimi dated 28 June 2022, [298]; SN-5, 37-38.

continue to meet interest payments in respect of those monies. Accordingly, unless Westpac submits a proper legal claim for 5 Bulkara Street surplus within 7 days, then such monies should be applied to the payout of the Aksara debt.

VI Conclusion

70. An appropriate amount of funds should be released from the freezing order to enable Mr Tesoriero to pay for the proper conduct of his defence (an amount of \$1.866 million in a lump sum) and also his ordinary living expenses (\$5,000 per week – past calculated from September 2021 to date, and future from 1 July 2022 to date of judgment). To refuse the application would exceed the purpose of a freezing order by, in effect, denying Mr Tesoriero the legitimate use of his only assets to defend the numerous, complex and grave allegations made against him by the Applicants (who are amply resourced). An outcome favourable to the Applicants at trial could not be justified as a matter of public policy if Mr Tesoriero is denied proper legal representation. The ‘careful and anxious judgment’ for which the application calls should be exercised by allowing the application.

Dated: 29 June 2022

P J HAYES

O WOLAHAN

P G TURNER

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